No. 216

In the Supreme Court of the United States

OCTOBER TERM, 1967

FLORENCE FLAST, ET AL., APPELLANTS,

v.

JOHN W. GARDNER, AS SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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OPINIONS BELOW

The opinion of the three-judge district court (J.A. 21a) is reported at 271 F. Supp. 1. The prior opinion of the single district judge, granting the motion for the convening of a three-judge court (J.A. 13a), is reported at 267 F. Supp. 351.

JURISDICTION

The judgment of the district court dismissing the complaint (J.A. 3a) was entered on June 19, 1967. A notice of appeal was filed on June 26, 1967 (J.A. 3a). On October 16, 1967, this Court noted probable jurisdiction, 389 U.S. 895.

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The jurisdiction of this Court is invoked under 28 U.S.C. 1253. There is, however, a serious question whether appellants' contentions were required to be heard by a district court composed of three judges, which is the predicate for direct review by this Court. We discuss the jurisdictional question in Point I, *infra*, pp. 9–21.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, of the Constitution of the United States:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution * * *.

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *.

The relevant provisions of Titles I and II of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 241a *et seq.*, (Supp. II, 1965–1966), are set forth in the Appendix to Appellants' Brief.

QUESTION PRESENTED

Whether appellants, as citizen-taxpayers, have standing, solely by virtue of that status, to enjoin federal officers from approving federal grants to State agencies which allegedly use the funds in violation of the First Amendment.

STATEMENT

Appellants are citizens who pay federal income taxes (J.A. 5a).[1] They brought this action against the appellees, the Secretary of Health, Education and Welfare, and the Commissioner of Education, alleging that in "approving any program for the expenditure of Federal funds to finance * * * instruction or guidance services in religious and sectarian schools, or the purchase of textbooks and instructional and library materials for use in religious and sectarian schools" (J.A. 10a) appellees were violating the Establishment and Free Exercise Clauses of the First Amendment (J.A. 9a).

The expenditures which appellants attack were made by State and local authorities out of federal grants to the States under Titles I and II of the Elementary and Secondary Education Act of 1965. Essentially, Title I authorizes federal grants to States for the use of their local educational agencies when the local agency presents an application which the appropriate State educational agency has determined meets the various criteria set forth in the Act. 20 U.S.C. 241e.[2] The local agency's plan must be designed "to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families." Each plan must meet various standards, including a demonstration (20 U.S.C. 241e(a)(2)):

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[1] In addition, one appellant, Helen D. Henkin, has children attending the elementary or secondary grades in the public schools of New York. *Ibid.*

[2] All statutory citations are to Supplement II, 1965-1966, of the United States Code, unless otherwise indicated; all references to Title 45, C.F.R., are to the February 1967 revision, 32 Fed. Reg. 2742 *et seq.*

> (2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate; * * *.

Title II authorizes federal grants to States which submit plans for the acquisition of library resources and other instructional materials for the use of children and teachers in public and private elementary and secondary schools. 20 U.S.C. 823. The place where the instructional materials will be provided for use by public and private school children is not a condition of plan-approval, and is thus not subject to control by appellees.

Section 805 of the Act, 20 U.S.C. 885, specifically provides that nothing in the Act may be construed to authorize any payments for religious worship or instruction. The Commissioner's regulations for administering Title II direct that the State plan must provide that federal funds "will not be used for religious worship or instruction, or for school library resources, textbooks, or materials to be used in such worship or instruction." 45 C.F.R. 117.4(c) (1967).

The complaint prayed that a three-judge court be convened "to declare unconstitutional the determination and action of the [appellees] * * *" (J.A. 9a), to "adjudge and declare that the determination and

action of the [appellees] * * * is not authorized or intended by the Elementary and Secondary Education Act of 1965, or in the alternative if such determination and action are within the authority and intent of the Act, the Act is to that extent unconstitutional and void", and to enjoin the appellees "from approving any program for the expenditure of Federal funds to finance in whole or in part instruction or guidance services in religious and sectarian schools, or the purchase of textbooks and instructional and library materials for use in religious and sectarian schools." (J.A. 10a).

The parties assumed that the substantiality of the issues would make a three-judge court appropriate, but appellees moved to dismiss on the ground that appellants plainly lacked standing to bring this action. Deeming the standing question itself substantial, District Judge Frankel referred the case to a court of three judges, 267 F. Supp. 351. Over his dissent, the court thereupon dismissed the complaint on the ground that *Frothingham* v. *Mellon,* 262 U.S. 447, established that the status of citizen-taxpayer is not of itself sufficient to create standing to challenge federal expenditures, 271 F. Supp. 1. This appeal followed.

SUMMARY OF ARGUMENT

I

As the issues have been clarified by appellants' presentation, it appears that this case was not required to be heard by a three-judge court, and there-

fore a direct appeal to this Court is not authorized. Viewed in the light of appellants' own characterization, their suit is not designed to enjoin the operation of the Elementary and Secondary Education Act of 1965 on the ground of the Act's repugnance to the Constitution. Rather, conceding the Act's constitutionality in general, they challenge the implementation of certain types of programs established by the New York City Board of Education, contending that appellees are not authorized by the Act to approve grants which may be used to fund these projects. Only in the event that these local programs are held to be authorized by the Act do the appellants assail its validity, and then only with respect to the class of programs whose creation and implementation by the New York City Board of Education they oppose. Objection to the specifics of administering an Act whose substantial constitutionality is not challenged does not require the convening of a three-judge district court, as the plain language and the purposes of the three-judge court statute demonstrate.

II

If the Court finds it proper to reach the question tendered by this appeal, the action of the court below should be affirmed. The core of appellants' position is that, because this suit would, on the merits, presumably pose certain important questions of "preferred freedoms" under the First Amendment, they must therefore have standing to assert the claims. This argument turns on the erroneous assumption that the function of the federal judiciary is to decide all ques-

tions of constitutional interpretation that may arise in the course of governmental administration, irrespective of who seeks the guidance. Thus, appellants argue, the *Frothingham* rule should be brushed aside when it interferes with the discharge of that function. Article III, however, ordains that the federal courts must confine themselves to the disposition of cases and controversies. The power to decide questions of constitutional interpretation arises solely as an incident to the decision of cases and controversies, in that the court may render nugatory an unconstitutional enactment that would otherwise be dispositive of the rights of the parties.

The principle that a federal taxpayer *qua* taxpayer lacks standing to challenge specific expenditures of federal revenues is required by the case or controversy limitation of Article III. Without such a rule, as this case demonstrates, the federal courts would become in effect a council of revision, empowered to review virtually any act of Congress or the Executive upon the request of any of seventy million potential "plaintiffs." Such a conception is far removed from that of the founders, who regarded each Branch of the government as being under a co-equal obligation to interpret and apply the Constitution within that Branch's proper sphere of activity. The ultimate power of judicial review may be invoked only where executive or legislative action is relied on to sustain or preclude a litigant's assertion of a specific claim to relief. A judicial and justiciable question is not presented simply because a taxpayer disagrees with the uses to which tax money is put unless he can

show that the federal program has some specific and definable impact on his private rights.

III

If *Frothingham* is viewed as a rule of restraint rather than as a jurisdictional limitation, so that taxpayers' suits might in some cases be proper, we suggest that the circumstances here presented do not warrant such exceptional treatment. Under the Elementary and Secondary Education Act, federal funds are used to finance an immense range of local programs, which vary in possibly significant ways from State to State and district to district. A taxpayer's suit asserting a broad challenge to whole classes of programs in operation across the country would require the sifting of countless factual variations and could not fail to obscure the process of constitutional adjudication. Moreover, a taxpayer's suit brought against federal officials, who play no part in the design or implementation of State and local plans, is not well suited to probing the details on which constitutional differences may turn. This type of suit cannot achieve any reliable exploration of the critical facts in the absence of federal supervision over local decision-making; neither appellees nor other federal officials are authorized to exercise such supervision. Nor is there pressing need to carve an exception for cases such as this; there are modes of obtaining judicial review of various programs under this Act in which individuals with a more immediate personal interest in the outcome of the litigation would be asserting their claims directly against the State and

local officials who make the challenged decisions. These methods of securing judicial review obviously afford a sounder basis for constitutional adjudication than would taxpayers' suits.

ARGUMENT

I. SINCE APPELLANTS HAVE NOT SOUGHT TO ENJOIN THE OPERATION OF AN ACT OF CONGRESS ON THE BASIS OF ANY SUBSTANTIAL CLAIMS THAT THE ACT ITSELF IS UNCONSTITUTIONAL, A THREE-JUDGE COURT WAS NOT REQUIRED AND A DIRECT APPEAL TO THIS COURT DOES NOT LIE

We recognize that by noting probable jurisdiction the Court has at least preliminarily determined that the question of taxpayer standing is sufficiently debatable and important that summary disposition of the appeal was not called for. Nevertheless, we deem it our responsibility to call the Court's attention to certain other considerations which indicate that the case is not properly here on direct appeal. The Court has not infrequently raised, *sua sponte,* the jurisdictional question whether a three-judge court was required.[3] It therefore appears incumbent upon the parties to raise such a question when in the course of preparing the case for presentation in this Court it fairly appears that a special statutory court was not required. See, *e.g., Thompson* v. *Whittier,* 365 U.S. 465. We turn first to this question.

1. Appellants invoke the authority of 28 U.S.C. 1253 (1964 ed.) to bring this case directly to this Court

[3] *E.g., Kesler* v. *Department of Public Safety,* 369 U.S. 153, 155; cf. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 305–306.

from the district court. That statute confers jurisdiction to entertain such an appeal only from the grant or denial of an injunction in a civil action "required by any Act of Congress to be heard and determined by a district court of three judges." We did not contest the appropriateness of a three-judge court if dismissal by a single judge for a clear lack of standing was not in order, and did not advert to the question whether this action was "required" to be heard by a three-judge court when we filed our Motion to Dismiss or Affirm. In their opening brief in this Court, however, appellants have provided elaboration of the nature of their suit which reveals that, in focusing on the constitutional question of standing, the parties failed to recognize the other conditions in 28 U.S.C. 2282 (1964 ed.) which govern the requirement that certain suits be heard by three-judge courts.

2. Appellants' complaint refers only to Titles I and II of the Elementary and Secondary Education Act of 1965. The specific aspect of Title I that is spoken of is Section 205(a)(2), 20 U.S.C. 241e(a)(2), which permits federal grants to States for use by local educational agencies if the appropriate State educational agency has approved the local plans as making provision, *inter alia,* for "special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment)" in which educationally deprived children who attend private elementary and secondary schools in the district can participate.

The complaint specifically concedes that Congress did not intend, in enacting this provision, to require

that local educational agencies violate the First Amendment to the United States Constitution in order to qualify for funds (J.A. 6a–7a). Indeed, the complaint recites that there are many programs which can be and in fact have been instituted by local educational agencies like the New York City Board of Education which qualify for federal funds without violating the federal Constitution, in that they are conducted on public premises (J.A. 7a). Appellants next allege, however, that appellees have approved, and unless enjoined will continue to approve, programs of the same nature which are to be conducted in religious and sectarian schools (J.A. 8a).[4] Two causes of action are then stated: first, that the "determination and action of the [appellees]" constitute an establishment of religion, and, second, that the "determination and action of the [appellees]" constitute a prohibition of the free exercise of religion, all contrary to the First Amendment (J.A. 9a). By way of relief, the complaint seeks (1) a declaration that the "determination and action" of appellees as set forth is unconstitutional (J.A. 9a), (2) a declaration that their "determination and action" is unauthorized and unintended by the Act, but if within the authority and intent of the Act "the Act is to that extent unconstitutional and void" (J.A. 10a), and (3) an injunction forbidding the appellees' approval of programs

[4] Since this is an allegation of fact, its truth must be assumed for purposes of this appeal. We may note, however, that if the Commissioner did in fact approve individual projects and expenditures under them, he was acting extra-legally, for, under the statute, local projects under Title I are approved by the State agency but not by any federal officer.

for expenditures to finance programs in religious and sectarian schools (J.A. 10a).

Despite the formal, contingent reference to the question of the constitutionality of Title I, an understanding of the complaint as appellants themselves have explained it, and an awareness of the actual pattern of the statute they challenge, lead to the conclusion that it was unnecessary to convene a three-judge court to hear their claims. Section 2282 of the Judicial Code requires such a court only when a litigant seeks to enjoin "the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution * * *." It is clear, therefore, that a three-judge court is not indispensible unless an injunction is sought on the ground that a statute is unconstitutional. Yet appellants have expressly disavowed any such frontal attack on the validity of the statute here involved. In the Statement in their opening brief, they explain: "The plaintiffs do not challenge the constitutionality of the Elementary and Secondary Education Act of 1965." (Br. 4). They then immediately quote the paragraphs of their complaint supporting this position—paragraphs which acknowledge that many valid programs have been instituted under the aegis of the Act. (Br. 4–5). Appellants characterize as the "essence of the complaint insofar as Title I of the Act is concerned" (Br. 5) those paragraphs which complain of the *use* to which federal funds have been and will continue to be put.

That it is the specifics of administration that they assail rather than the constitutionality of the Act—a

distinction which, as discussed below, is decisive on the three-judge court question—becomes even more clear when other statements in their brief are examined in light of the structure of the Act. Essentially, Title I authorizes the approval of federal grants to States to facilitate the ability of their local educational agencies to meet the special remedial needs of educationally deprived children from low income families. Among other objectives, the Act contemplates that the local agency will make equitable provision for participation by such children who happen to be enrolled in private elementary and secondary schools. 20 U.S.C. 241e(a)(2). The decision as to the details of how federal funds will be used—whether for programs in public facilities or in religious or sectarian facilities, for instance—is in no way controlled by the Act. *Indeed, neither the appellees nor any other federal official participate in such a choice.* In fact, once this decision is made by the local educational agency, it is not even reviewed by appellees or any other federal officer; the local agency becomes eligible for a grant if the appropriate State educational agency approves its application by determining that the local plan meets the basic criteria of the Act. There is no project-by-project approval at the federal level, and neither the Act nor the regulations promulgated by the appellees express any preference on the question whether these services should be provided on public, sectarian, or even neutral premises. That choice rests with the local educational agency. In this context, the seemingly contradictory allegations in the complaint become recon-

cilable with the explanations in the appellants' brief. The latter demonstrate that appellants have not made any serious challenge to the constitutional validity of Title I.

As appellants make clear in this Court, the core of their objection to aid to private schools is that in some instances federally funded programs are allegedly being conducted on the premises of sectarian institutions. But, as we have seen, this is not dictated by the Act or even specifically approved by any federal official. So long as the State agency certifies that the local plan satisfies the Act's objectives of allowing educationally deprived children attending private schools to share in the remedial programs being offered for children of low-income families in general, the decision as to the site where such services are provided is left exclusively to the judgment of the local educational agency. It is the judgment made by the New York City Board of Education to which appellants really direct their constitutional objection, not the validity of Title I itself. Thus, appellants point out that in the course of arguing this case before the court below they "expressly stated that this case was to be deemed one limited to the practices of the New York City Board of Education" (Br. 4) (footnote reference to stenographic transcript omitted). Later on, they suggest, with some accuracy, that this suit "should have been deemed a suit against a municipality" (Br. 17).[5]

[5] In subsequent argument, appellants urge that constitutional jurisdiction existed in the present case "even if it be deemed a suit against the Federal Government rather than the Board of Education of the City of New York" (Br. 24).

In this connection, we note that on the same date that this suit was filed in the United States District Court for the Southern District of New York, counsel for appellants also filed a suit in the New York State Supreme Court directly against the New York City Board of Education and other city and State officials. *Polier, et al.* v. *Board of Education of the City of New York, et al.*, (Sup. Ct., N.Y. County, Index No. 19540/1966). The "Litigation Docket of Pending Cases Affecting Freedom of Religion and Separation of Church and State" prepared by the Commission on Law and Social Action of the American Jewish Congress (No. 6, December 1, 1967) explains that the instant suit "parallels the *Polier* complaint with respect to the New York City programs under Title I of the Federal Elementary and Secondary Education Act of 1965 * * *" (p. 5). "Sponsors" for both suits are the same: the American Jewish Congress, United Federation of Teachers, United Parents Associations, and New York Civil Liberties Union (*ibid.*). The proceedings in the New York City suit have been adjourned by stipulation to await further action on this appeal. Although the seven appellants are nominally different from the seven plaintiffs in the New York City suit, both actions were brought by "citizens and taxpayers." The identity of the individuals in whose names the suits have been brought is immaterial in light of their reliance on taxpayer status to establish standing.

Reading the allegations of the instant complaint, then, with attention to appellants' own explanations, it is clear that they do not seek to enjoin the operation

of Title I "for repugnance to the Constitution", 28 U.S.C. 2282; rather, they contend that "the *administration* of the Elementary and Secondary Education Act of 1965 in New York and other parts of the nation is unconstitutional * * * (Br. 52) (emphasis added).[6] But, irrespective of what may be taking place elsewhere, appellants explain that they seek to compel appellees "to defend only the programs and practices engaged in within the City of New York" (Br. 4).

So cast, the complaint in this case did not require a hearing before a three-judge district court. For a three-judge court to be required, a complaint must (1) raise a non-frivolous attack on the constitutionality of an Act of Congress, and (2) seek an injunction (3) against the operation, execution, or enforcement of the statute on that ground. Congressional insistence on three-judge courts in injunctive challenges to the constitutionality of federal legislation was designed to "prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme * * * by issuance of a broad injunctive order." *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 154. Because the evil sought to be avoided is the total interruption of an entire statutory plan by a single judge, this Court has made it clear that Congress did not intend to require a special court, with the attendant direct appeal, "when administra-

[6] A footnote explaining the contention that violations are taking place in other parts of the nation refers back to the earlier assertion that it "may be assumed that the practices within the City of New York complained of herein are paralleled in other parts of the nation * * *" (Br. 4), with a citation to the complaint in a pending Pennsylvania case.

tive action and not the Act of Congress is assailed." *William Jameson & Co.* v. *Morgenthau,* 307 U.S. 171, 174. When the object of the action is to establish that an official took unconstitutional action which was not authorized by a statute, a single judge may entertain the suit, for "an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification." *Phillips* v. *United States,* 312 U.S. 246, 252. It is not enough for plaintiffs (as the appellants do here) to impugn the statute which "may be said to authorize the questioned conduct": "the complaint must seek to forestall the demands of some general * * * policy, the validity of which [they] challenge * * *." *Phillips* v. *United States, supra,* 312 U.S. at 253.

While it may be possible to frame an attack on the constitutionality of Title I and seek to enjoin its implementation as such, appellants eschew that position. As we have seen, their principal focus is (at most) on appellees' approval of grants to States which will in turn be used to finance local programs that may include provisions for remedial services on sectarian premises. Their basic contention is that while even such remote federal participation violates the First Amendment, it was not intended by Congress when Title I was enacted. Appellees, they argue, are engaging in unauthorized conduct by approving funds for plans containing objectionable elements. This is obviously an argument directed to the construction of the Act, and not its constitutionality.

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Only contingently and tangentially have appellants expressed doubts about the validity of the Act, and then only insofar as it may permit certain specific programs. Even if appellants initially leveled an attack on the constitutionality of the statute, they are free to by-pass the need for a three-judge court by restricting their complaint to the claim that the administrative action taken in implementing the statute is unauthorized. See *Ex parte Hobbs,* 280 U.S. 168, 171–172. Compare *Kennedy* v. *Mendoza-Martinez, supra,* 372 U.S. at 153–154.

In sum, while an attempt to enjoin the enforcement of a statute on the ground that it is unconstitutional as applied may prompt the convening of a three-judge court, no such special court is required where, as here, the complaint, as explained or clarified by the moving parties, "seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional," for in the latter situation "the attack is aimed at an allegedly erroneous administrative action." *Ex parte Bransford,* 310 U.S. 354, 361. But the extraordinary three-judge court requirement must be read narrowly, *Bailey* v. *Patterson,* 369 U.S. 31, 33, and when litigants like appellants have—in view of the remote relation between the Act and the specific programs about which they complain—fairly chosen to challenge the administrative decisions of the appellees (or more accurately, of the New York City Board of Education), a three-judge panel is not required. As they have limited their complaint, appellants do not seek a "broad injunctive order" which would "paralyze

totally the operation of [the] entire regulatory scheme" of Title I. *Kennedy* v. *Mendoza-Martinez, supra,* 372 U.S. at 154. At most, they wish to forbid further approval of local programs in New York which contain provisions they view as objectionable. This request could have been heard by a single district judge.[7]

3. The situation with respect to Title II of the Elementary and Secondary Education Act of 1965 appears to be the same. This title authorizes the approval of federal grants for the acquisition of school library resources, textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools. 20 U.S.C. 821(a). A State that wishes to obtain grants for this purpose must submit to the appellee Commissioner of Education a plan which, among other criteria, will provide assurance that "to the extent consistent with law" such materials "will be provided on an equitable basis for the use of children and teachers in private elementary and secondary schools in the State * * *." 20 U.S.C. 823(a)(3)(B). The Commissioner plays no role in the determination by the State agency as to *where* these materials should be made available—the factor which appellants regard as decisive for constitutional purposes—so long as equitable access is guaranteed. The State plan may or

[7] *Zemel* v. *Rusk*, 381 U.S. 1, is not to the contrary. There, the Court held that a litigant need not elect between non-constitutional and constitutional attacks pleaded in the alternative, in order to secure a three-judge court. 381 U.S. at 5–6. That is not this case, for appellants here have chosen to concentrate on the alleged unlawfulness of administrative action and have specifically conceded the basic constitutionality of Title I.

may not disclose the place and manner of providing books and materials for the use of private school children. The complaint contains no allegation concerning the content of the New York State plan under Title II, or of the plan of any other State, for that matter.

Fairly read in light of appellants' characterizations as previously discussed, their complaint does not seek to enjoin the operation of Title II on the ground of its repugnance to the Constitution. The heart of their factual allegations concerning this title is that large sums of federal funds, "with the consent and approval of the [appellees], have been and continue to be used and, unless enjoined by this Court, will continue to be used to finance the purchase of textbooks and instructional materials for use in religious and sectarian schools" (J.A. 8a). Again the focus is objectionable *use*. Both counts of their causes of action are cast in terms of alleged First Amendment violations resulting from the "determination and action" of the appellees (J.A. 9a), and it is the approval of such programs for New York City which appellants seek to enjoin (J.A. 10a; Br. 3–4). Section 2282 of the Judicial Code, for reasons discussed above in connection with Title I, does not require that appellants' disagreements with the operation of individual federally-funded plans drawn up by State and local authorities be considered by a court of three judges.

Because the allegations and prayers in appellants' complaint were not of the kind "required by any Act of Congress to be heard and determined by a district court of three judges," this Court does not have jurisdiction to entertain a direct appeal under 28 U.S.C.

1253. The Court may dispose of this improper appeal by vacating the judgment of the district court dismissing the complaint, and remanding the case to that court with directions to enter a fresh decree from which appellants may take a timely appeal to the court of appeals on any issues not necessarily disposed of in the course of holding that a three-judge court was not required. See *William Jameson & Co.* v. *Morgenthau, supra,* 307 U.S. at 174; *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.,* 304 U.S. 243, 251–252; cf. *Moody* v. *Flowers,* 387 U.S. 97, 104; *Phillips* v. *United States, supra,* 312 U.S. at 254.

II. THE JUDICIAL POWER UNDER ARTICLE III OF THE CONSTITUTION DOES NOT EXTEND TO A REQUEST BY A FEDERAL TAXPAYER FOR A RULING ON THE CONSTITUTIONALITY OF EXECUTIVE OR LEGISLATIVE ACTION INVOLVING THE SPENDING OF TAX REVENUES, IN THE ABSENCE OF SOME DIRECT AND DEFINABLE IMPACT ON THE PLAINTIFF

On the issue of standing, should the Court proceed beyond the jurisdictional question, the case brings into sharp focus a fundamental disagreement as to the constitutional plan for the federal judicial function. The question presented by appellants (Br. 2) is whether "citizens and taxpayers of the United States" have standing to resort to the federal courts to challenge an expenditure as contravening the First Amendment. No direct legal interest is asserted in the program funded by the expenditure apart from appellants' tax contributions into the general treasury. Appellants' basic position is that whenever questions of constitutional interpretation arise in the course of governmental administration the federal judicial

power is automatically available, irrespective of whether the person seeking judicial guidance can point to some legally protected interest, not shared with the citizenry at large, which warrants judicial attention to his complaint. Under this view rules of standing are seen as little more than annoying technicalities, which can and should be brushed aside whenever their effect is to prevent or postpone judicial treatment of important constitutional questions. In short, the argument is that standing should be found because the ultimate question tendered is substantial—in the abstract, even though there is no measurable impact on the plaintiff.

Yet it is clear that the "Judicial Power" given to the courts of the United States by the Constitution extends by its terms only to "Cases" or "Controversies." And it has long been settled and accepted that the federal courts can only decide actual controversies between parties directly affected by the questions in suit and by their resolution. Courts decide questions of constitutional interpretation only where necessary to the disposition of a case or controversy, not merely on the bare request for advice from a governmental official or a private citizen. The Executive and Legislative Branches of the Government of course share a co-equal obligation to decide questions of constitutional interpretation when necessary to the performance of the executive and legislative functions, and these decisions are subject to judicial review only in a *bona fide* case or controversy. Under this view, the "Case" or "Controversy" language of Article III provides a purposeful and effective limitation on the

judicial function. It is indeed circular argument to contend that, since federal courts have the power to decide questions of constitutionality only when necessary to the disposition of a case or controversy, the term "case or controversy" should be broadly construed whenever necessary to permit this Court to address itself to a question of constitutionality. Yet the device of a federal taxpayer suit is, we believe, dependent on just such an argument. To permit such taxpayer suits would alter the plan conceived nearly two centuries ago; it would open the federal courts to consideration of virtually every imaginable question bearing on the constitutionality of the actions of the Executive and Legislative Branches. By the same token, it would undermine the organic structure whereby those co-equal Branches have the final responsibility for resolving constitutional questions which arise within their spheres of activity, unless and until those decisions are challenged in a "case" brought by a person who can point to some definable interference with his rights.

We note another defect in appellants' position—their assumption that only a taxpayer's suit can raise the constitutional questions they seek to litigate. As we explain in Part III below, there are other mechanisms for presenting the constitutional issues appellants seek to litigate in a manner far more appropriate to informed constitutional adjudication.

1. In developing our consideration of this question, we turn first to this Court's decision in *Frothingham* v. *Mellon*, 262 U.S. 447, where, also, the plaintiff sued as a federal taxpayer. She challenged the constitu-

tionality of using federal tax revenues to make grants to the States under the Maternity Act for the purpose (as in the instant case) of promoting the general welfare (there, by helping to alleviate infant mortality). The basis of the challenge was that the Maternity Act was beyond any of the powers granted to Congress by the Constitution. Mrs. Frothingham's argument on the merits—which at that time was admittedly substantial—was that acts of Congress cannot be independently justified under the General Welfare Clause; and that the Maternity Act did not fall within any of the more specific, enumerated powers given to Congress by the Constitution. The question of Mrs. Frothingham's standing to sue as a federal taxpayer was fully discussed in both briefs. (October Term 1922, No. 962, Brief for Appellant at pp. 5–10; Brief for Defendants and Appellees at pp. 13–18.) Mrs. Frothingham contended that—

> If these payments [under the Maternity Act] are made, this plaintiff will suffer a direct injury in that she will be subjected to taxation to pay her proportionate part of such unauthorized payments. * * *

(Brief for Appellant at p. 10.) The Solicitor General contended that no justiciable controversy was presented. (Brief for Defendants and Appellees at 13.)

The Court held that Mrs. Frothingham's status as a taxpayer did not confer standing to challenge the use of federal revenues. The Court carefully cast this decision in terms of the power and responsibility of the various Branches under the Constitution (262 U.S. at 488–489):

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. * * * We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position

> of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess.

The Court thus viewed the "case" or "controversy" language in Article III as a real limitation on the occasions in which federal courts have power to interpret the Constitution. Significantly, there is no hint that the Court was confining its definition of its constitutional function to claims less favored in our hierarchy of values.[8] Rather, the Court spoke of fundamental judicial incapacity resulting from the Constitution itself. This awareness, we submit, reflected the understanding and intention of the Framers. When Dr. Johnson, at the Constitutional Convention, moved to extend the judicial power to cases arising under the Constitution of the United States, as well as under its laws and treaties, Madison "doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution & whether it ought not to be limited to cases of a Judiciary Nature. *The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.*" 2 Farrand, *The Records of the Federal Convention of 1787* (1911) at 430 (emphasis added). The motion passed, "it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature." *Ibid.* This exchange underlines the sense of the Con-

[8] We note that *Frothingham* was decided in an era when this Court took a restrictive view of federal welfare legislation, and before the Court distinguished between "preferred freedoms" and other constitutional limitations. See *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4.

vention that each branch of the Government has the "right of expounding the Constitution" in connection with the performance of its constitutional function. This plan is necessarily controverted by appellants' position, which assumes that a case "of a Judiciary Nature" must be presented by any governmental action involving a question of "expounding the Constitution."

In practical effect, acceptance of federal taxpayers' suits would convert the federal judicial system into a council of revision, empowered to rule, at the behest of any of seventy-odd million taxpayers, on the constitutionality of any action by the President or Congress involving the expenditure of money. Yet the Constitutional Convention itself deliberately rejected several efforts to provide in the Constitution for a Council of Revision, which would have included members of the federal judiciary and would have had the authority to "examine every act of the National Legislature before it shall operate." 1 Farrand, *The Records of the Federal Convention of 1787* (1911) at 21, 97–98, 108–110, 138–40; 2 Farrand, *op. cit., supra,* at 73–80. And while the primary objection urged against the proposal was that it would involve judges in decisions of policy as well as constitutionality (1 Farrand, *op. cit., supra,* at 97–98),* the members of the Convention were certainly aware of the provision which had recently been included in the Pennsylvania Constitution of 1776,

* It was also argued that "the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation." 1 Farrand, *op. cit., supra,* at 98.

creating an elective Council of Censors to meet every seven years "to enquire whether the constitution has been preserved inviolate in every part." Pennsylvania Constitution of 1776, Sec. 47, quoted in Sutherland, *Establishment According to Engel,* 76 Harv. L. Rev. 25, 43 (1962). The Convention made amply clear that it did not propose to give the federal courts a roving commission to enquire whether Congress and the President have been observing the Constitution. Yet this would be the practical consequence of permitting federal taxpayer suits.

The original understanding of the judicial function was expressed in *Marbury* v. *Madison,* 1 Cranch 137, 177–178, where this Court announced the power to pass on the constitutional validity of an Act of Congress not because "expounding the Constitution" was considered the unique and inseparable responsibility of the courts, but rather because decision of constitutional questions becomes necessary in the disposition of cases within the judicial sphere:

> Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. * * *

See, also, *Muskrat* v. *United States,* 219 U.S. 346, 361–363; *Blair* v. *United States,* 250 U.S. 273, 279; compare *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 341, 345–348 (concurring opinion of Brandeis, J.).

It would seem clear that the case or controversy limitation prevents this Court from ruling on a constitutional question involving the operation of the Executive or Legislative Branches simply because the President or Congress asks for a ruling. *Muskrat* v. *United States,* 219 U.S. 346; see Correspondence of the Justices (1793), reprinted in Hart & Wechsler, *The Federal Courts and the Federal System* (1953) at 75–77. Yet it is now urged that the federal courts should rule on any constitutional question involving the operation of the Executive and Legislative Branches (provided some money is spent), whenever a citizen-taxpayer asks for a ruling. We find the distinction difficult to grasp. In both cases, without the presence of a direct, definable, adverse interest, the only justification for assumption of jurisdiction would be the notion that the federal courts must pass on all constitutional questions as soon as anyone raises a protest. This proposition is, we believe, fundamentally at odds with the doctrine of separation of powers.

The country's political history confirms our thesis. From the earliest times, the Executive and the Congress have recognized their responsibility to conform their conduct to the dictates of the Constitution whether or not their decisions will subsequently be subjected to judicial scrutiny. When this Court refused to render advice to President Washington on

questions of international law, it effectively committed to his sole judgment the responsibility for deciding, in conformity with his appreciation of his official duties, what course of action to follow.[10]

There is nothing intolerable about the possibility that a particular federal program may not become a prompt subject of judicial review. Before a program becomes operative, two other Branches of the government, not insensitive to constitutional limitation, have at least implicitly found it agreeable to the Constitution. To paraphrase Justice Holmes' comment in *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U.S. 267, 270, "[I]t must be remembered that [those Branches] are ultimate guardians of the liberties and welfare

[10] The result that automatic judicial review would be likely to have on the attitude of Congress toward its responsibility to apply the Constitution has been aptly stated:

> One further point, there is a danger in our approach of putting all our eggs in the judicial basket. We are more and more getting to the idea, apparently implicity, that the only forum, the only governmental unit to protect civil liberties, is the court; that the President has no responsibility; that the legislature has no responsibility. Just find a way to get into court, and all our problems are solved.
>
> I think that the Constitution of the United States is not merely a mandate to the courts. It is a mandate to the executive and to the legislature, and we have to make the constitutional fight in the legislature as well as in the courts. It is the easiest thing in the world for Congress to say, "Pass the law; don't worry about the constitutionality. Let the Supreme Court pass upon the Constitutionality." We should fight within the Congress on constitutional issues and not give it an easy out by saying, "Let the Supreme Court protect us and give it all the responsibility."

Pfeffer, *Conference on Public Aid to Parochial Schools and Standing To Bring Suit*, 12 Buffalo L. Rev. 35, 64 (1962).

of the people in quite as great a degree as the courts." See, also, *United States* v. *Butler,* 297 U.S. 1, 87 (Stone, Brandeis, and Cardozo, JJ., dissenting).

So saying, we do not mean to suggest, of course, that the Elementary and Secondary Education Act of 1965, is not judicially reviewable.[11] Rather, it is pertinent to bring this perspective to bear in analyzing appellants' argument that the presence of a constitutional question should itself militate in favor of according *them* standing as taxpayers.

2. Appellants argue that federal taxpayer suits must be considered consistent with the judicial function as delineated by the "case or controversy" limitation of Article III, because this Court has assumed jurisdiction in *State* and municipal taxpayer suits. *Everson* v. *Board of Education,* 330 U.S. 1; *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370; *Adler* v. *Board of Education,* 342 U.S. 485; *Wieman* v. *Updegraff,* 344 U.S. 183, *Hawke* v. *Smith,* 253 U.S. 221; *Heim* v. *McCall,* 239 U.S. 175. There cannot, it is argued, be any constitutional significance in the difference between the interest of a State or local taxpayer in State or local expenditures, and the interest of a federal taxpayer in federal expenditures. This contention, however, ignores the fact that the State and local taxpayer cases generally arise in State courts and invariably involve the validity of State statutes or executive action in States recognizing taxpayer suits.[12] And insofar as those cases ignore the jurisdictional

[11] See the discussion in Point III, *infra,* pp. 55–57.

[12] *Crampton* v. *Zabriskie,* 101 U.S. 601, recognized standing on the part of a New Jersey municipal taxpayer. While the case arose in a federal court in New Jersey, the State courts

questions, we suggest that they are slim basis for undercutting this Court's specific pronouncements against federal taxpayers' suits.

Moreover, despite the dissenting judge's assertion (J.A. 41a), such a situation creates no "ludicrous anomaly" or "logically unacceptable parodox." The intentional design of the Framers that this Court serve a unique function as arbiter of the federal system, see *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 337–352, *Cohens* v. *Virginia,* 6 Wheat. 264, 413–423, explains why the existence and assertion of federal judicial power has special significance with respect to constitutional challenges to State conduct. The instant case, by contrast, involves the question of the role of the federal courts vis-à-vis the coordinate Branches, a question which turns on the principle of separation of powers rather than national supremacy. Where the State judiciary recognizes a right to sue and assumes jurisdiction to pass on the validity of acts of its executive or legislative branches, it is consonant with this Court's role in the federal system for it to assume jurisdiction when federal constitutional questions are presented.[13] On the other hand, acceptance of federal taxpayers' suits would require this Court to assume

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recognized standing in this type of suit. *State, Gregory, Taylor et al.* v. *Jersey City*, 34 N.J.L. 390 (1871).

To the extent that *Millard* v. *Roberts*, 202 U.S. 429; *Wilson* v. *Shaw*, 204 U.S. 24; and *Bradfield* v. *Roberts*, 175 U.S. 291, can be regarded as implicitly sustaining federal taxpayers suits, they were expressly overruled by *Frothingham*, 262 U.S. at 486.

[13] But even in this context, where the appropriateness of federal judicial review is at its zenith, the Court has made it clear that its jurisdiction is circumscribed by the requirement that

the function of constitutional censor as to every act of the President or Congress involving the expenditure of money. Such an undertaking, we submit, would not be consonant with this Court's role in a government of divided powers.[14]

3. *Doremus* v. *Board of Education*, 342 U.S. 429, confirms the teaching of *Frothingham* that a suit

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the issue be presented in the context of a concrete "case or controversy." *Doremus* v. *Board of Education*, 342 U.S. 429.

[14] The difference is reflected in *Coleman* v. *Miller*, 307 U.S. 433, where Kansas State legislators who had voted against ratification of the Child Labor Amendment were held to have standing to seek review of a State court's refusal to enjoin State officials from certifying that Kansas had ratified the Amendment. Surely, *Coleman* v. *Miller* does not mean that the federal courts could entertain a suit by a Congressman or Senator to invalidate an Act of Congress which he had voted against, even if his opposition had a constitutional foundation. In short, attacks on State statutes brought in States which recognize taxpayer suits do not involve a separation of powers problem, which was one of the primary origins of the case or controversy limitation.

It has also been suggested that the *Frothingham* case cannot be a part of the "case or controversy" limitation, since Congress may confer standing on a limited class of persons—such as competitors hurt by a grant of a license, or consumers hurt by a price-fixing order—to act as "private Attorney Generals" in suing to challenge official conduct. *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4, 14; *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470; *Associated Industries* v. *Ickes*, 134 F. 2d 694, 704 (C.A. 2), vacated for mootness, 320 U.S. 707. See Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255, 272–274 (1961). However, in these cases Congress conferred a right to sue on a specified class of persons who had suffered a particular and ascertainable injury as a result of the challenged official action. This, we submit, is far different from the conferral of a right to sue on any taxpaying member of the general public.

brought by a plaintiff solely in his capacity as a taxpayer does not come within the ambit of federal jurisdiction. There, this Court was asked to review a determination of a federal constitutional question by a State court which accepted the standing of taxpayers. Notwithstanding the State court's assumption of jurisdiction, this Court undertook an independent examination of the facts alleged to sustain federal jurisdiction, explaining that whether "such facts amount to a justiciable case or controversy is decisive of our jurisdiction." 342 U.S. at 433. The Court then determined that, because the complaint contained no suggestion that the religious practices complained of were financed by a separate assessment or that they in any way increased the cost of running the schools, there was indeed no basis for federal jurisdiction. While conceding that taxpayer actions have been entertained or reviewed in federal courts, the Court explained that the test is whether the suit is a genuine "pocketbook action" where the plaintiff can demonstrate a "direct and particular financial interest." A suitor complaining of a "religious difference" cannot establish "a legal case or controversy" by a "feigned issue of taxation." 342 U.S. at 434, 435.[15] Clearly this case presents no more. Not only are appellants unable even to allege that their tax liability would be affected by success on the merits, but it seems fair to note that it might in fact be more costly to provide federally funded services on public premises—which they spe-

[15] Even the three Justices who dissented from dismissal for want of jurisdiction recognized that under *Frothingham* "if this were a suit to enjoin a federal law, it could not be maintained * * *." 342 U.S. at 435.

cifically concede is constitutional—rather than on sectarian premises constructed and maintained by private contributions.

4. Appellants contend, however, that these considerations should not preclude the liberal assertion of First Amendment claims. It is unnecessary to go beyond *Doremus* to realize that the presence of a First Amendment claim does not create an exception to the constitutionally designed limitation on federal judical jurisdiction. Moreover, we suggest that the intensely practical underpinnings of the doctrine of separation of powers which the framers carefully made the basis for the operation of the national government apply with equal force to the Church-State problems which appellants wish to litigate. If this Court should endorse the assumption that all constitutional questions in this area are automaticlly subject to judical review, it is not unlikely that this awareness would tend to dilute the exercise of responsibility in this area by the Congress and the Executive. But it is the legislative and administrative processes which are peculiarly geared for making the delicate policy judgments on how best to accommodate the needs and goals of a happily diverse society. The nature of the judicial process makes it inherently unsuited to drawing the necessarily fine distinctions that must be made in comprehensive public welfare programs, especially in the absence of a clearly defined controversy between persons asserting specific, identifiable, and conflicting interests. The judicial power was confined to "Cases" because it is the unique function of the judicial process to focus on a con-

test between adverse parties asserting conflicting claims in connection with a specific personal or property interest. But as this case illustrates, an abstract and ill-defined objection cast in doctrinaire terms does not call for any consideration which is peculiarly judicial. Yet the constitutional plan consigns to the federal courts only those questions which are of a "Judiciary Nature."

5. In passing the Elementary and Secondary Education Act of 1965, Congress clearly recognized its obligation to conform its legislation to constitutional standards. Even though Congress was well aware of the possibility that the *Frothingham* rule would impede judicial review,[16] the congressional debates ex-

[16] In the debate on the proposed amendment which would have authorized judicial review of any portion of the Act, Congressman Celler stated: "We have been told—correctly, in my opinion—that the Constitution does not permit the courts of the United States to decide an issue at the request of someone whose sole interest in the matter stems from the fact that he is a taxpayer and that an expenditure of Federal funds is involved." 111 Cong. Rec. 6132. Congressman Celler's opposition to the judicial review provision stemmed from his position that it was not needed because the federal courts would find standing wherever constitutionally permissible, and thus a statute would add nothing. *Ibid.* Both Congressman Celler (*Ibid.*), Congressman Pucinski (111 Cong. Rec. 5973), and the Senate Committee (S. Rep. No. 146, 89th Cong., 1st Sess., at 35), thought that as a constitutional matter standing might be found to challenge any provision of the Act, by an extension of the school prayer cases. In those cases, of course, plaintiffs were accorded standing as parents of children in schools affected by the challenged establishment. *Engel* v. *Vitale*, 370 U.S. 421; *Abington School Dist.* v. *Schempp*, 374 U.S. 203.

In the Senate, Senators Cooper and Morse recognized that under *Frothingham* a federal taxpayers' suit could not be

hibit a pervasive concern for the constitutional considerations.[17] The sponsors of the legislation thought that it was constitutional, and it would not have passed had the major elements interested in the legislation failed to agree with that proposition.[18]

In order to avoid establishment problems, Congress provided various restrictions on the use of federal grants. As we have seen, Section 805, 20 U.S.C. 885, directs that the Act may not be construed to authorize payments for religious worship or instruction.[19] To forestall any suggestion that aid extended to children and teachers in sectarian schools under Titles I and II allows sectarian schools to divert their resources to the religious aspect of the children's education, Congress specifically directed that federally funded services and materials may not supplant those which

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brought, but thought that a state taxpayers' suit in a state court might suffice to raise the necessary constitutional questions. 111 Cong. Rec. 7316–18.

[17] See 111 Cong. Rec. 5761 (Rep. Griffin); 5762–3 (Rep. Thompson); 5961 (Rep. Roosevelt); 5962 (Rep. Farbstein); 5977–8 (Rep. Cahill); 5983 (Rep. Scheuer); 5985 (Rep. King); 5986–7 (Rep. Goodell); 5988 (Rep. Green); 7307–8 (Sens. Morse and Ellender); 7316–18 (Sens. Cooper and Morse); 7531–32 (Sen. Ribicoff).

[18] See 111 Cong. Rec. 7317 (Sen. Morse); 7531–32 (Sen. Ribicoff); 57433–36 (Rep. Powell).

[19] In this respect, the Elementary and Secondary Education Act of 1965 is typical of congressional sensitivity to First Amendment questions in modern programs of federal aid to education. Other statutory safeguards have been provided in Section 403(d) of the National Defense Education Act, 20 U.S.C. 463(d) (1964 ed.); Section 401 of the Higher Education Facilities Act of 1963, 20 U.S.C. 751(a)(2)(C)–(D); and Sections 111, 207, 526, and 609 of the Higher Education Act of 1965, 20 U.S.C. 1011, 1027, 1116, and 1129.

otherwise would have been provided, and the Commissioner's regulations give further force to this policy. See 20 U.S.C. 823(a)(5); 45 C.F.R. 117.5(a)(5); 45 C.F.R. 117.24; 45 C.F.R. 116.17(h); 45 C.F.R. 116.19 (c) and (e); see, also, 20 U.S.C. 241g(c)(2).

The constitutional problems involved in federal aid to elementary and secondary education are, we believe, peculiarly appropriate for congressional resolution. In giving such aid, Congress faced the task of finding an accommodation between two principles. On the one hand, parents have a constitutional right to send their children to sectarian schools, provided they comply with State requirements, *Pierce v. Society of Sisters,* 268 U.S. 510, and millions of children go to such schools. Congress quite reasonably determined that these children should be allowed to participate in a general federal program to equalize educational opportunities in low-income areas. Yet, on the other hand, the government may not aid a religious establishment. To a large extent, the validity of the congressional reconciliation between these two constitutional provisions may turn on the practical effect of the Act as it operates in local school districts. In such matters, legislative flexibility to experiment and adjust should be paramount, free from judicial supervision at the behest of litigants whose only demonstrable interest is that their tax dollars are perhaps playing some minute role in the experiment.

6. It is also argued that *Frothingham* does not apply to a case brought under the First Amendment, since that Amendment involves rights of religious liberty and conscience which have a preferred position

and have traditionally been committed to the federal courts for enforcement. The short answer is that there is nothing in the Constitution to exempt First Amendment cases from the "case or controversy" requirement of Article III. The framers rejected *in toto* the concept of a Council of Revision to oversee the constitutionality of acts of Congress; they did not except any questions from the limitation confining the federal judicial power to "cases of a Judiciary Nature." This Court in dismissing the appeal in *Doremus, supra,* for want of federal jurisdiction necessarily determined that the addition of the First Amendment did not serve to modify the original intention and effect of Article III.

In any event, the "preferred position" of the First Amendment, to the extent that it does and should exist, does not advance appellants' contention that taxpayers *qua* taxpayers should have standing to raise First Amendment claims. The "preferred position" doctrine properly applies to insure that society may not single out an individual to be subject to special disabilities or discrimination because of religious or political views. See, *e.g., Dombrowski* v. *Pfister,* 380 U.S. 479; *Sherbert* v. *Verner,* 374 U.S. 398; *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624. In these cases, the focus of adjudication is the impact of governmental action on individual rights, and the litigant has standing to object because he is personally affected in some particularized sense. Even in Establishment cases, where the government sponsors a religious exercise in a school, the court can focus on the effect of the exercise on the pupil whose

conscience it offends. See *Abington School Dist.* v. *Schempp,* 374 U.S. 203; *Engel* v. *Vitale,* 370 U.S. 421. The traditional focus of the judicial function has been the impact of governmental action on the rights of an ascertainable individual or group. The "preferred position" doctrine prompts no departure from that process.

The fact that the First Amendment operates to prevent compulsory taxation to support religious establishments (*Everson* v. *Board of Education,* 330 U.S. 1, 11–13) does not confer standing on appellants as taxpayers. Unlike the plaintiffs in *United States* v. *Butler,* 297 U.S. 1, 57–61, appellants do not resist the collection of any tax; nor do they claim that their taxes should be lower.[20] Rather, they claim that, having paid their taxes, they are entitled to supervise the use to which tax funds are put, in order that they may assure themselves that no violation of the Establishment Clause occurs. Nor do appellants claim that their future tax liability would be affected if they prevailed on the merits of this suit; they cannot assert either that the taxes *they* paid are being devoted to a program to which they object, or even that their taxes freed funds that otherwise would not have been available for application to the programs

[20] Of course, if a special tax were levied to support a religious establishment, as in the case of the bill in the Virginia Assembly to which Madison's famous "Memorial and Remonstrance Against Religious Assessments" was addressed, the standing of a taxpayer to resist collection of the tax would be clear. See *Everson* v. *Board of Education,* 330 U.S. 1, 72–74 (Supplemental Appendix to dissenting opinion of Rutledge, J.)

attacked. In this light, it is difficult to fathom why their status as taxpayers should accord them any greater power to invoke the federal judicial function than a citizen *qua* citizen may have.[21]

Appellants' position thus reduces itself to an assertion that they should be allowed to seek judicial aid to protest federal programs which offend their sensibilities. Where the federally funded program has an undeniably valid secular objective and the impact on the general class of taxpayers or citizens is as remote as in this case, members of those classes who can point to no more specific interest do not have standing to institute a federal court challenge to the program.

In this case, moreover, appellants are suing, not officers who are making the expenditures to which they object, but officers who at most have permitted others to make those expenditures from federally-granted funds. Even if taxpayers had standing to sue a federal officer who makes payments for an improper purpose, all appellants would be entitled to protest is the constitutionality of the grants to the State of New York and other States. This they have not sought to do. They insist, on the contrary, that the general structure of the Elementary and Secondary Education Act is constitutionally permissible; they object only to certain uses of a small part of the granted funds

[21] It is interesting to note that the Senate judicial review bill, S. 3, 90th Cong., 1st Sess., would not only purport to confer standing on federal taxpayers to raise First Amendment challenges to certain federal welfare programs (Section 3(a)), but would also attempt to authorize "any citizen" of the United States to bring such suits, without more (Section 3(b)).

made by appellees' grantees or subgrantees. It is difficult enough, as *Frothingham* demonstrates, to find an "injury" to a federal taxpayer in a federal expenditure that violates the Constitution. It is even more difficult to find such an "injury" in a federal expenditure that may, but need not, be so used as to violate the Constitution. Yet, vis-à-vis appellees, this is the "injury" that appellants allege.[22]

8. There are, of course, intensely practical underpinnings to the rule precluding federal litigation where the plaintiff's only legal interest is his rather attenuated concern for the fate of his tax payments. Analysis of these consequences underscores the soundness of the Framers' decision to limit judicial recourse to persons who can demonstrate that they will be immediately affected by the outcome of their lawsuits. It has been argued that the effect of overruling *Frothingham* would not be very great, since only a few decisions would be needed to establish the constitutionality of most federal spending programs. *Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 2097,* 89th Cong., 2d Sess., part 2, at 494 (remarks of Professor Davis). We submit, however, that overruling *Frothingham*—even

[22] Implicit in appellants' argument is an assumption that federal granting officers are responsible to preclude any unconstitutional use of the granted funds by their grantees. Congressional delineation of federal responsibility does not suggest such a duty. Considering the multiplicity of federal grant programs (the Department of Health, Education, and Welfare alone administers some 200 such programs), the validation of this assumption would in itself have far-reaching effects on federal-state, federal-local, and federal-institutional relationships.

in the Establishment Clause area, for which appellants suggest special treatment—would bring before the federal courts a host of questions that could not be solved without protracted and vexing litigation.

This Court's own experience illustrates that even the seemingly broadest questions in this area do not admit of simple solutions in a single suit. Thus, twice the Court was called upon to examine the constitutionality of released-time programs,[23] while two more decisions were required on the question of the constitutionality of religious recitation in public schools.[24] Yet there are literally scores of different programs in operation under the Elementary and Secondary Education Act alone (described at pp. 46–53, *infra*), which vary in potentially significant ways. Indeed, the prospect for litigation under this one Act would be magnified as taxpayers sought to contest the modifications made to numerous local plans over the years.

Nor would the litigation engendered as a result of overruling *Frothingham* be confined to the Elementary and Secondary Education Act and the other federal programs of aid to education which involve church-supported educational institutions.[25] If tax-

[23] *McCollum* v. *Board of Education*, 333 U.S. 203; *Zorach* v. *Clauson*, 343 U.S. 306.

[24] *Engel* v. *Vitale*, 370 U.S. 421; *Abington School Dist.* v. *Schempp*, 374 U.S. 203.

[25] The G.I. Bill of Rights, 38 U.S.C. 1601 *et seq.*; The National School Lunch Act, 42 U.S.C. 1751 *et seq.*; National Defense Education Act, 20 U.S.C. 421 *et seq.*; Higher Education Facilities Act of 1963, 20 U.S.C. 701 *et seq.*; Economic Opportunity Act of 1964, 42 U.S.C. 2701 *et seq.* (community action programs under Title II of the Act, 42 U.S.C. 2781 *et seq.*), may involve arrangements with church-related agencies.

payers are held to have standing to protest the use of tax revenues in aid-to-education programs, they would also have constitutional status to challenge other federal expenditures. In short, if *Frothingham* is overruled, the prospect is that the federal courts will be continuously involved in monitoring governmental activity for traces of religious content or effect at the instance of persons who can demonstrate no direct, concrete impact on themselves. The courts will also be involved in the sort of detailed and immediate supervision and review of legislative and executive actions which is wholly unsuited to judicial action.

III. THERE IS NO COMPELLING REASON TO ACCORD THE INSTANT TAXPAYERS' SUIT EXCEPTIONAL TREATMENT

Some commentators have suggested that the *Frothingtham* rule is not one of constitutional dimensions—that its application is a matter of judicial discretion, dependent on the nature of the case. Jaffe, *Judicial Control of Administrative Action* 483–490 (1965). Appellants argue that, at least where First Amendment claims are raised, traditional rules of standing should be waived. For the reasons elaborated above, we disagree with that view. However, even if it is assumed *arguendo* that federal taxpayer suits are permissible and appropriate in some circumstances, this case does not warrant exceptional treatment. Indeed, in light of the nature and structure of the Elementary and Secondary Education Act of 1965, the instant suit is singularly inappropriate.

The Act does not establish any single scheme or program. Rather, it authorizes the financing of programs

planned and administered by local school authorities. And while the local programs must conform to broad federal guidelines, these programs can—and do—vary in significant ways from district to district according to the manner in which the local authorities formulate and administer the programs. In any adjudication of the constitutionality of programs under the Act, the court must accordingly focus on the particular facts of these programs as they are planned and administered in a particular locality. See *McCollum* v. *Board of Education*, 333 U.S. 203, 226 (concurring opinion of Frankfurter, J.), stressing "the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied." The factual disparity among the many local plans indicates that the constitutional questions that the programs may raise could not be decisively answered in anything short of an extensive patchwork of litigation. Moreover, if this Court were to hold that a federal taxpayer may sue for review of programs under this Act, it would seem that a federal taxpayer living in New York City would have as much right to challenge a federally funded program operating on the West Coast as in his own locality. If he has a right to sue as a federal taxpayer, he has a right to insist that the district court pass on the constitutional validity of any local program financed with federal funds under the Act [26]—

[26] While appellants' complaint is worded broadly (J.A. 6a–10a), they now assert that they have limited their action to programs in New York City. It is, of course, their prerogative to limit their complaint (see Point I, *supra*). But this does not solve the problem. For if it were held that appellants have standing as federal taxpayers, any such limitation would be

including programs funded under appellees' authority but designed and implemented beyond the forum of the suit. The district court thus faces the dilemma of (1) reviewing in detail the facts of numerous types of programs operating in different areas of the nation or (2) undertaking to formulate general constitutional guidelines for the local programs under attack without the detailed investigation and assessment of particular facts which is essential to informed constitutional adjudication in the difficult and troubled area of federal aid to education. In order to appreciate the potential combinations and permutations under this one Act it is necessary to examine more specifically than we have thus far its structure and operation.

1. Under Title I of the Elementary and Secondary Education Act of 1965, the Commissioner of Education makes grants to States to finance programs formulated by local educational agencies. 20 U.S.C. 241e. The programs must meet two basic requirements: (1) they must be "designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families" and be "of sufficient size, scope and quality to give reasonable promise of substantial progress toward meeting those needs", and (2) provision must be made, to the extent consistent with the number of educationally-deprived private school children

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entirely voluntary on their part: other plaintiffs, in another suit, would be entitled as federal taxpayers to insist on having all federally funded programs under the Act reviewed in a single lawsuit, regardless of locality.

in the district, for their participation in "special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment)." 20 U.S.C. 241e (a)(1) and (2). The regulations (45 C.F.R. 116.16–116.25) preserve the broad discretion given by the statute to the local authorities, within the limits of congressionally-intended safeguards.[27] Indeed, the regulations specifically direct the local authorities to tailor their programs to local needs and circumstances. 45 C.F.R. 116.17(e). In this respect, the regulations are effectuating specific legislative intent. The Committee reports list 49 examples of types of programs that could be financed under Title I, stating that local educational agencies are to have "wide latitude" in fashioning programs in which private school pupils can participate. S. Rep. No. 146, 89th Cong., 1st Sess., at 10–11, 28; H. Rep. No. 143, 89th Cong., 1st Sess., at 17.

[27] 45 C.F.R. 116.19(d) proscribes separation by school enrollment or religious affiliation where projects involving joint participation by private and public school children are carried out in public facilities; 45 C.F.R. 116.19(e) states that public school personnel may be made available to other than public school facilities only to provide specialized services for educationally deprived children not normally provided by the private school; that mobile equipment only may be placed on private school premises and must be removed at the end of the project; and that no funds may be provided for payment of salaries of private school teachers or employees, or for construction of facilities for private schools, 45 C.F.R. 116.20(e) provides generally that control of Federal funds granted pursuant to the application, and title to property acquired with such funds, shall not inure to the benefit of any private school but shall be in a public agency, and that administrative control of the projects shall be in the local public agency.

In the first year of operation under Title I, over 22,000 local projects were financed. Department of Health, Education, and Welfare, Office of Education, *First Annual Report, Title I, Elementary and Secondary Education Act of 1965,* at 13. These projects included remedial reading classes, school lunches, medical, dental and psychiatric services, field trips, summer day camps, training for teachers and staff, parental counseling, English classes for non-English speaking children, special tutoring, programs for the physically handicapped, language programs for the deaf, provision of additional teachers to reduce class size, and transportation services. See *First Annual Report, supra,* at 97–99, listing 22 "project areas" with 76 "examples of specific activities."

Under Title II of the Act, the Commissioner of Education is authorized to finance State programs for "acquisition of library resources (which, for the purposes of this subchapter, means books, periodicals, documents, audiovisual materials, and other related library materials), textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools in the State." 20 U.S.C. 823(a). The Act requires that title to these materials may vest only in a public agency, and that only materials approved for use in the State's public schools may be financed. 20 U.S.C. 825. In the regulations are restrictions designed to ensure that the public agency retains control over materials loaned for the use of private school children and teachers (45 C.F.R. 117.5); the regulations further require that these materials

not be used for religious instruction or worship (45 C.F.R. 117.4(c)). The Senate Report on Title II recognizes that "State plans regarding the administration of programs will vary from State to State." S. Rep. No. 146, 89th Cong., 1st Sess., at 23. One possibility suggested by the Committee was that some States might wish to establish "a central public depository within a school district or within an area to serve more than one school district from which all elementary and secondary school children and teachers could 'check out' library resources." *Ibid.*

2. Within this framework, there are at least four respects in which local programs under the Act can differ and which could, either singly or in combination, have constitutional significance.

(a) *Whether the federally-financed program takes place on or off sectarian school premises.* Appellants would apparently argue (see para. 9, J.A. 7a) that a public school teacher, paid with federal funds, could not conduct a class on the premises of a sectarian school without a resulting violation of the Establishment Clause, since in this context public authority is being used in a manner which supports the institutional authority of the sectarian school; but they concede that no unconstitutional consequences occur when the class is taught on public school property, even though pupils attending sectarian schools are released in order to attend the federally financed class. While this distinction may be relatively clear-cut as applied to the teaching of classes,[28] there could be a

[28] The present regulations recognize the distinction by restricting the uses for which public school personnel may be made available to non-public school facilities. 45 C.F.R. 116.19(e)

great deal of factual variation relevant to constitutional adjudication in the loan of equipment and library resources. Before the constitutional merits could be reached, a searching factual investigation of each local program would be required to determine the actual substance of the arrangements under which federally financed property is used on sectarian school premises.

(b) *Whether the federally financed program is an "educational" or a "welfare" program.* Appellants suggest that a federally financed program of teaching sectarian school children might be considered so close to the traditional educational function of the sectarian school as to constitute governmental establishment. On the other hand, they concede (para. 9, J.A. 7a) that federal provision of services such as school lunches, and medical and dental examinations, would be valid as general welfare measures, even though provided on the sectarian school property. Cf. *Everson* v. *Board of Education,* 330 U.S. 1. See also, Pfeffer, *Church, State, and Freedom,* 569–570 (1967 rev. ed.). The difficulty here is in determining whether a particular program is of an "educational" or a "welfare" nature. Many programs financed under Title I would appear to be on the borderline or to partake of both elements: speech therapy, guidance counseling and psychiatric services, and special classes for the deaf and physically handicapped. The test might be whether the particular program has traditionally been considered to be part of the function of a school rather than a welfare agency. But tradition and practice as to the types of

program offered by schools vary greatly among different localities.[29]

(c) *Whether the sectarian school maintains its identity in connection with programs taking place outside its premises.* Title I authorizes "dual enrollment" programs. 20 U.S.C. 241e(a)(2). These programs—sometimes called "shared time"—provide that sectarian school pupils spend part of their time enrolled in a public school, taking public school classes. It has been argued that "the constitutionality or unconstitutionality under the First Amendment of shared-time education would depend upon how it is carried out in practice." Pfeffer, *Church, State and Freedom,* 579 (1967 rev. ed.). If, for example, a class is taught on public premises by a public school teacher, but all or most of the pupils come from the local sectarian school, it might be argued that the class is is still too closely connected with the sectarian school. On the other hand, if the sectarian school pupils are genuinely intermingled with the public school student body during the time they spend taking classes at the public school, and the sectarian school authority is completely absent, it would be more difficult to attack the constitutionality of the program.[30] The degree of diffusion in a particular locality might determine constitutionality.

[29] 45 C.F.R. 116.19(e) provides that "Public school personnel may be made available on other than public school facilities only to the extent necessary to provide special services" designed to meet the special educational needs of educationally deprived children and "only where such services are not normally provided by the private school."

[30] "It has been argued that by relieving parochial schools of the necessity of purchasing expensive laboratory, gymnasium, home economics, and manual training equipment, the state is

(d) *Availability of alternative means to help educationally deprived children without aiding sectarian schools.* If a program is found to aid religion although designed to further a valid secular legislative purpose, the question would arise whether other means, not involving aid to religion, would suffice to achieve the purpose. See *McGowan* v. *Maryland,* 366 U.S. 420, 449–52; *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 265 (Brennan, J. concurring); cf. *Sherbert* v. *Verner,* 374 U.S. 398, 406–409. The legislative purpose of the Elementary and Secondary Education Act of 1965—to help educationally deprived children of low-income families (20 U.S.C. 241a), including those attending sectarian schools—is clearly valid. Insofar as the Act might be considered to aid religion, determination of the adequacy of less direct programs may well depend on the circumstances of the particular school district or the State involved. For example, while a shared-time or dual-enrollment program—under which sectarian school pupils spend part of their day enrolled in a public school—might be the best way of meeting the problem, some States have restrictions that would undermine the adequacy of such an approach, as for instance, a ban on the public

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thereby according them substantial aid. In a sense this is true, but in receiving this aid the parochial schools are surrendering their pupils to the public schools for part of the school day." Pfeffer, *Church, State, and Freedom,* 578 (1967 rev. ed.).

Federal regulations recognize the problem, by forbidding separation of classes on public facilities by school enrollment or religious affiliation, where there is joint participation in a project by public and private school children. 45 C.F.R. 116.19(d).

bussing of sectarian school pupils.[31] In addition, some States have interpreted their constitutions to prohibit use of public school facilities for sectarian school classes;[32] and several States have statutes which would prevent part-time enrollment of sectarian school pupils in public schools.[33] Here again, constitutional adjudication would require a searching investigation of the circumstances in each State and each local school district.

3. By setting forth some examples of how State and local programs under this Act may vary in significant respects, we do not mean to suggest that any particular factor or combination of factors would lead to a holding of unconstitutionality. This canvas suggests, rather, that there is an almost infinite number of gradations in the relationship between federal funds and sectarian schools, and a decision sustaining standing

[31] *Opinion of the Justices of the Supreme Court of Delaware*, 216 A. 2d 668 (1966); *Visser* v. *Nooksack Valley School District*, 33 Wash. 2d 699, 207 P. 2d 198 (1949); *McVey* v. *Hawkins*, 364 Mo. 44, 258 S.W. 2d 927 (1953); *Matthews* v. *Quinton*, 362 P. 2d 932 (Alaska, 1961); *State ex rel. Reynolds* v. *Nusbaum*, 17 Wis. 2d 148, 115 N.W. 2d 761 (1962); *Silver Lake Consolidated School District* v. *Parker*, 238 Iowa 984, 29 N.W. 2d 214 (1947); *Board of Education for Independent School District No. 52* v. *Antone*, 384 P. 2d 911 (Okla., 1963).

[32] See Katz, "Note on the Constitutionality of Shared Time," in *Religion and the Public Order*, 1964, at 91–94.

[33] See Pfeffer, *Church, State, and Freedom*, 578 (rev. ed. 1967):

"* * * In some states, laws require full time attendance on the part of all public school enrollees, other than those who are physically handicapped. In others, the amount of state aid public schools receive is determined by full time attendance, so that acceptance of parochial school students for part time instruction would impose a probably prohibitive additional financial burden on local public school districts."

in this case would not materially advance the resolution of the constitutional questions surrounding so many divergent patterns. For this reason we urge that this is not the area in which—still assuming that *Frothingham* is found to be merely a rule of judicial restraint—to permit suits by taxpayers. Since local programs under this Act vary greatly from district to district, it would be necessary in the course of broad-brush taxpayer suits like the present one to inquire into the formulation and administration of the plans by many local authorities. Litigation in the context of cumbersome factual inquiries into the practices of many jurisdictions is not a course calculated to achieve the reliable adjudication of constitutional questions.

Moreover, if we take the present suit as limited to the practices of the New York City Board of Education, there are still other difficulties which militate against according appellants standing. This suit was brought against federal officials; but, as we have seen, neither appellees nor any other federal officials have anything more than remote contact with the decisions on which the First Amendment questions may turn. To authorize roving taxpayer suits would presuppose an extremely detailed set of federal regulations and policing procedures that do not exist, and which, if instituted, would result in a substantial hindrance to the administration of programs under the Act and a frustration of the congressional intent to accord local authorities broad discretion in tailoring the programs to the individual needs of their localities.[34]

[34] See note 22, *supra*, p. 42.

4. Even if it were only a matter of sound judicial policy, suits like the present one should be barred as inappropriate. Though the wisdom of the course we suggest seems clear, it would, perhaps, be more debatable if it foreclosed the possibility of judicial review of important constitutional questions. No such consequence would follow, however, from the conclusion we press. To be sure, a decision to bar taxpayer suits in this area would, as this case illustrates, preclude wide-ranging objections to unspecified programs by plaintiffs whose only legal position is indistinguishable from the interest of millions of others who have chosen not to sue. The very fact that to this very moment there is considerable confusion as to just what appellants wish to challenge emphasizes the desirability of this outcome. There is, however, a corollary: That there is no necessity for the federal courts to suffer such abstract and general suits, because there are other channels for review whereby persons more immediately and ascertainably affected can focus precisely on the aspects of certain programs which are alleged to injure them.

While this is not the occasion to exhaust the techniques for judicial review available to persons with a more direct interest than the widespread one of being a federal taxpayer, several readily appear. The Act itself explicitly provides for judicial review when the appellee Commissioner of Education has disapproved or suspended a State's plan or its participation in programs under Title I or Title II. See 20 U.S.C. 241k(a), 827(a). Thus, if the State failed to provide services for children attending sectarian schools or

provided them less than their statutory due on the ground that such services would violate the First Amendment, and the Commissioner disapproved the State plan as not complying with the Act, the State would be able to secure judicial review of the constitutional limitations on its participation by proceeding in the court of appeals. Such a route would be adequate to test many constitutional questions. See *Oklahoma* v. *United States Civil Service Commission,* 330 U.S. 127.

Furthermore, many States permit their residents and taxpayers to challenge the action of the State or its subdivisions in conducting allegedly unconstitutional programs. Or, even, as in *Board of Education of Central School District No. 1* v. *Allen,* 20 N.Y. 2d 109, 281 N.Y.S. 2d 799, probable jurisdiction noted, No. 660, this Term, January 15, 1968, local public school boards may be able to contest as unconstitutional a program that would require the sharing of benefits with children in parochial schools.[35]

If a public school teacher were assigned to duties in connection with parochial school children or facil-

[35] The Elementary and Secondary Education Act Amendments of 1967, Pub. L. 90–247, approved January 2, 1968, provide for a State plan in connection with Title III of the Act, and in this regard include a procedure for resolving disputes between the State and its local agencies when a local agency is dissatisfied with the State's action in passing on its application for approval of a federal grant. A petition for review may be filed in a United States court of appeals. Since the provisions of Title III (Supplementary Educational Centers and Services) with respect to providing services for children in private schools are similar to those in Titles I and II, this may provide an additional avenue for judicial consideration of these questions.

ities and he considered the program incompatible with the First Amendment, it is not difficult to imagine several contexts in which the constitutional merits could be litigated. Compare *Keyishian* v. *Board of Regents,* 385 U.S. 589; *Slochower* v. *Board of Education,* 350 U.S. 551. Moreover, establishment issues could be raised by one State officer, *e.g.* the Attorney General, authorized to protest the action of another State officer, *e.g.,* the Education Commissioner, because of his participation or refusal to participate in a federal program. See, *e.g., Special District for Education and Training of Handicapped Children* v. *Wheeler,* 408 S.W. 2d 60 (Mo. 1966); *State ex rel. Reynolds* v. *Nusbaum,* 17 Wis. 2d 148, 115 N.W. 2d 761 (1962). Insofar as federal constitutional issues were raised, the action between them would be reviewable by this Court. See *West Virginia ex rel. Dyer* v. *Sims,* 341 U.S. 22.

To confine review of programs under this Act to the types of proceedings suggested above would pit against each other the individuals or agencies who claim direct injury from a specific program and the State or local officials who are responsible for designing and administering that particular program. In light of the availability of these other recourses which permit more orderly and searching presentations of the constitutional questions involved, we submit there is no compelling reason for this Court to make an exception for taxpayers' suits like the instant one. The uncertainty surrounding the objectives of this litigation demonstrates why this taxpayer's suit characteristically fails to involve "such a personal stake in the out-

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come of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions * * *." *Baker* v. *Carr*, 369 U.S. 186, 204.

CONCLUSION

If the Court agrees that a district court composed of three judges was not required to hear appellants' request for relief, the judgment of the district court should be vacated and the case remanded for entry of a fresh decree so as to permit appellants to perfect a timely appeal to the court of appeals. Should the Court find that its jurisdiction has been properly invoked, the judgment of the district court dismissing the complaint should be affirmed.

Respectfully submitted.

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